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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
MOBILEMEDIA CORPORATION, et al.)
)
Applicant for Authorizations and Licensee)
of Certain Stations In Various Services)

WT DOCKET NO. 97-115

To: The Commission¹

**WIRELESS TELECOMMUNICATIONS BUREAU'S OPPOSITION TO
MOBILEMEDIA'S MOTION TO DELETE ISSUE 14(b)**

The Acting Chief, Wireless Telecommunications Bureau (Bureau), by his undersigned counsel, hereby opposes the "Motion to Delete Issue 14(b)" (Motion) filed by MobileMedia Corporation, et. al. (MobileMedia), on May 21, 1997. As the Bureau will demonstrate below, the Motion is substantively deficient and should therefore be denied.

1. MobileMedia's request for deletion of issue 14(b) of the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 97-124 (released April 8, 1997) (HDO) is substantively deficient.² MobileMedia seeks

¹ By Order, FCC 97M-93 (released May 27, 1997), the Presiding Judge properly certified MobileMedia's motion to the Commission. Accordingly, the Bureau's instant responsive pleading is being directed to the Commission for consideration.

² The issue at para. 14(b) of the HDO requires the Commission:

to determine the facts and circumstances surrounding MobileMedia's submission of its October 15, 1996, Report to the Bureau (including, but not limited to, the identity of all persons who participated in the preparation of the Report and the nature and extent of their participation, including their intent) and whether MobileMedia knowingly made false statements, engaged in misrepresentation, lacked candor, or willfully or repeatedly violated Section 1.17 of the Commission's Rules with regard to the submission of the October 15, 1996, Report to the Bureau.

deletion of the issue concerning the facts and circumstances underlying the submission of MobileMedia's October 15, 1996, Report (Report). MobileMedia argues that the Commission misconstrued certain statements in the Report and erroneously designated Issue 14(b). As the Bureau will demonstrate, material and substantial questions of fact do exist, and, thus, neither deletion of the issue nor summary decision is appropriate.

2. The standard for deletion of an issue is well established. "[P]etitions to delete issues are looked upon with disfavor, and will not be granted absent a compelling showing of some unusual circumstances, such as where material information is overlooked, misconstrued or not considered in the determination to specify the issue." Community Broadcasting Company, Inc., 48 FCC 2d 487 (Rev. Bd. 1974). MobileMedia has not met that standard. The errors alleged by MobileMedia do not support its request for deletion because the alleged errors are caused by MobileMedia's shortcomings, and the issue cannot be resolved without a hearing to determine whether the deficiencies were in fact the result of an error or an intent to deceive the Commission. The first alleged error concerns the following statements at p. 14 of the Report:

Some employees recall specific conversations or events that led to [sic] them to believe senior management knew about and approved the filings. Indeed, one employee recounted informally questioning the propriety of the inaccurate filings with the Chief Operating Officer, noting that the practice was contradictory to his experience at Bell South.

Paragraph 3 of the HDO states, "The Report did not disclose that the subject 'employee' was a corporate officer of MobileMedia." MobileMedia argues that the "HDO finding is clearly

based upon an assumption that the employee referred to in the [Report] was Mark Witsaman, the Company's Senior Vice-President/Chief Technology Officer." MobileMedia Motion, pp. 4, 14. It then claims that the referenced employee was in fact Todd Wheeler, another employee who was not an officer. MobileMedia then argues that the issue should be deleted because it was based upon an error of fact.

3. This argument provides no basis for deleting the issue. MobileMedia concedes that, in part, the error is "understandable" (MobileMedia Motion, p. 14) due to MobileMedia not disclosing the employee's name, and to the fact that both Messrs. Witsaman and Wheeler are both former Bell South employees. This admission shows that the decision to designate Issue 14(b) was not based upon an error by the Commission but on a failure to provide complete and clear information in the Report. MobileMedia may be able to show at hearing that the statement was a product of a lack of clarity or precision as opposed to an intent to deceive the Commission. MobileMedia cannot, however, claim that the decision to designate for hearing was based upon a clear error of the Commission when the source of the alleged error was its own Report. It therefore cannot show the compelling circumstances necessary to support deletion of the issue.

4. The second alleged error cited by MobileMedia concerns the following statements at pp. 25-26 of the Report:

In short, none of the members of senior management involved in the derelictions -- either directly or as a matter of responsibility -- remain employed by the Company.

The Company has further considered and, to date, has rejected making additional personnel changes based on knowledge of the practices that occurred. Given that the violations were conceived of and executed by Regulatory Counsel, and to some degree endorsed by the senior management, the Company has concluded that other lower-level employees should not be disciplined simply for their awareness of the practice.

MobileMedia states that the Commission in paragraph 10 of the HDO misunderstood those "terms" when it stated that none of the corporate officers who were aware of the derelictions and involved as a "matter of responsibility" are still employed by MobileMedia.

MobileMedia did not define the terms "senior management," "awareness" and "responsibility" in the Report. Because Mr. Witsaman, the Chief Technology Officer (and one who was "aware" of the derelictions and seemingly has such responsibilities) continues to hold that position at MobileMedia, the Commission questioned the accuracy of these statements in the Report. MobileMedia does admit that it could have more artfully stated the facts underlying these two sentences discussed in paragraphs 3 and 10 in the HDO which relate directly to Issue 14(b). MobileMedia Motion, p. 22. If MobileMedia concedes ambiguity and lack of clarity in these critical sections of the Report, any conclusion the Commission may have made predicated on those points cannot be a compelling case of error on the Commission's part.

5. MobileMedia also argues that it clearly identified Mr. Witsaman as somebody who knew of the wrongdoing, and that the statement in the Report therefore could not be construed as misleading. MobileMedia Motion, pp. 15-17. These assertions cannot be accepted without being tested in hearing. The Report unambiguously claimed that none of the "members of senior management involved in the derelictions -- either directly or as a matter of responsibility -- remain employed by the Company." The Commission had every reason to categorize Mr. Witsaman, who was a corporate officer, as a member of "senior management." Furthermore, MobileMedia has not adequately explained why Mr. Witsaman would not be involved in the derelictions "as a matter of responsibility" if he was responsible for constructing stations (including the stations which were constructed in direct violation of Commission Rules) and had knowledge of the wrongdoing. None of the documents to which MobileMedia now refers clearly point to Mr. Witsaman as a person who is not covered by the statement concerning "senior management." MobileMedia has not shown that the Commission clearly erred in its interpretation, and its request for deletion must therefore be denied.

6. Although MobileMedia's motion is styled as a motion to delete, it is in reality, more in the nature of a motion for summary decision. The motion presents factual averments which are offered in an attempt to eliminate any substantial and material questions of fact. Specifically, four attorneys aver that they prepared the Report in good faith and had no intent to deceive the Commission. Notwithstanding the affidavits, more substantial questions of fact exist under Issue 14(b), and a hearing is needed to resolve those questions.

In denying the Bureau's request to clarify Issue 14(b)³, The Commission noted, at paragraph 6, that:

Although the conduct and intent of MobileMedia's principals will be the most relevant consideration in determining the ultimate question of MobileMedia's qualifications, the nature and extent of participation by others (including outside counsel) in the preparation of the report, including their intent, is also relevant to creating a full record of the facts and circumstances bearing on this question.

The attorneys cannot speak competently to the conduct or intent of any of MobileMedia's principals or other employees who participated in the preparation of the Report. It is conceivable that the attorneys believed the Report to be true but that principals knew that statements in the Report were false or misleading. Affidavits must be based on personal knowledge. See 47 C.F.R. §1.251(c). According to the Commission in the above order, the conduct and intent of MobileMedia's principals is the most relevant consideration under Issue 14(b) (and the other designated issues), and that matter can best be addressed in a hearing.

7. MobileMedia also devotes a large portion of its Motion to both reiterating MobileMedia's voluntarily disclosure of its derelictions involving its filing of false FCC Forms 489, and defending all involved with the preparation of the Report as totally without any intent to deceive. This information simply does not substitute for the hearing process, where there is to be a full and complete inquiry into the facts and circumstances related to the issue in question. This information must be fully tested in the crucible of the hearing process.

³ Order, FCC 97-152 (May 5, 1997).

8. The three cases MobileMedia relies upon as precedent for its motion are easily distinguishable from the instant case. In Newsweek Radio Stations, Florida, Inc., 33 RR 2d 891 (1975), the Commission **denied** the Motion to Delete, ruling that the basis for the Motion, attached affidavits, were too self-serving and conclusory in nature. Here, MobileMedia wants its Motion **granted**, at least in part, on the basis of its four affidavits. The Bureau suggests that the affidavits offered here are equally self-serving and conclusory. In their four declarations, the attorneys for MobileMedia claim, inter alia, that they had no intent to deceive and that they cooperated with the Bureau fully. Those are comments which they obviously believed needed to be made, but simply do not support deletion of the entire issue, as was found in Newsweek.

9. The second case, WOIC, Inc., 44 FCC 2d 891 (1974), involved the successful deletion of all the issues and subsequent dismissal of an HDO. There, the licensee in question had not offered any factual information prior to designation. After designation, when new counsel disclosed the facts, it was obvious that there were no issues remaining which raised substantial questions of fact. Here, as shown above, MobileMedia made pre-designation disclosures which raised substantial and material questions of fact, and its latest pleadings did not eliminate those questions.

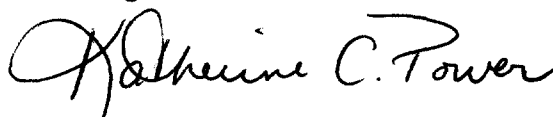
10. Finally, in Southern Broadcasting Co., 40 FCC 2d 1109 (1973), the Commission deleted a misrepresentation issue added by the Review Board -- involving a licensee's exhibit listing the specific number of hours of local live programming. The Commission determined

that the Review Board's interpretation of the exhibit was contrary to the plain language of the exhibit, and that the exhibit was consistent with the licensee's explanation. Here, MobileMedia's Report was, at best, admittedly unclear, and deletion is unwarranted. Given that either the facts or the outcome of the above decisions are inapposite to Mobilemedia's situation, they do not support MobileMedia's Motion.

11. Accordingly, the Bureau asks the Commission to deny MobileMedia's "Motion to Delete Issue 14(b)."

Respectfully submitted,

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Acting Chief, Wireless Telecommunications Bureau

A handwritten signature in black ink, appearing to read "Katherine C. Power". The signature is fluid and cursive, with the first name being the most prominent.

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June 2, 1997

CERTIFICATE OF SERVICE

I, Rosalind Bailey, a secretary in the Enforcement Division, Wireless Telecommunications Bureau, certify that I have, on this 2nd day of June, 1997, sent by first class mail, copies of the foregoing, "Wireless Telecommunications Bureau's Opposition to Mobilemedia's Motion to Delete Issue 14(b)" to:

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